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No. 08-697

In the Supreme Court of the United States

MARTIN GJIDODA, PETITIONER

v.

ROBIN BAKER, FIELD OFFICE DIRECTOR, IMMIGRATION AND CUSTOMS ENFORCEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, permissibly divested the district court of jurisdiction to consider petitioner's petition for a writ of habeas corpus.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is unreported. An earlier opinion of the court of appeals (Pet. App. E1-E9) is not published in the *Federal Reporter* but is reprinted in 48 Fed. Appx. 982. The judgment of the district court (Pet. App. B1) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. D1-D4) and the immigration judge (Pet. App. C1-C10) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2008. The petition for a writ of certiorari was filed on November 19, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, legal immigration into the United States is controlled by the issuance of immigrant visas abroad by consular officers acting under the authority of the Secretary of State. 8 U.S.C. 1154(b), 1201(a). Congress has also authorized the Attorney General and the Secretary of Homeland Security to relieve certain qualifying aliens who are already in the United States of the need to depart and obtain a visa through consular processing by adjusting their status to that of a lawful permanent resident. See 8 U.S.C. 1255(a); *Randall* v. *Meese*, 854 F.2d 472, 473-474 (D.C. Cir. 1988) (R.B. Ginsburg, J.), cert. denied, 491 U.S. 904 (1989). Adjustment of status is discretionary and is "a matter of grace, not right." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978).

The statute authorizing the Attorney General to adjust the immigration status of an alien to that of a lawful permanent resident requires, *inter alia*, that the alien be eligible to receive an immigrant visa and be admissible to the United States for permanent residence. 8 U.S.C. 1255(a). An alien who has been convicted of, or admits having committed, a crime involving moral turpitude is inadmissible to the United States, 8 U.S.C. 1182(a)(2)(A)(i)(I), and is therefore ineligible to adjust his status. Some aliens may seek a waiver of this ground of inadmissability under 8 U.S.C. 1182(h), however, which grants the Attorney General discretion to waive the inadmissibility of certain criminal aliens if he determines that the alien's removal would result in extreme hardship to the alien's United States citizen or lawfully resident spouse, parent, or child. The Attorney General may not, however, waive the inadmissibility of an alien

"who has been convicted of (or who has admitted committing acts that constitute) murder." *Ibid.*

b. In 1961, Congress amended the INA to establish a petition for review filed in the court of appeals as the "sole and exclusive procedure" by which an alien could seek review of a final deportation order. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651 (8 U.S.C. 1105a(a) (1994)). Congress created an exception, however, stating that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." § 5(a), 75 Stat. 652.

That basic framework remained in place until 1996, when Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 309(c), 110 Stat. 3009-625. AEDPA and IIRIRA limited judicial review of final orders of removal to the courts of appeals for most aliens, imposed a uniform 30-day deadline for the filing of petitions for judicial review, and appeared to eliminate all judicial review for aliens who had committed certain crimes that rendered them inadmissible or deportable. 8 U.S.C. 1252(a)(1), (2)(C), (b)(1) and (2). In *INS* v. *St. Cyr*, 533 U.S. 289, 305-314 (2001), however, this Court interpreted the 1996 Acts as not eliminating the ability of criminal aliens to seek limited habeas review in district court.

2. Petitioner is a native of the former Federal Republic of Yugoslavia. Pet. App. C2. In 1973, a Yugoslavian court sentenced petitioner to a term of 20 years of

imprisonment in connection with the death of two people, including his wife. *Id.* at C6, D2.[1]

In March 1985, having been released from prison, petitioner was admitted to the United States on a temporary visitor visa. Petitioner married after entering the United States, and he and his current wife have two United States citizen children. In 1995, petitioner filed an application for adjustment of status. On August 30, 1995, the former Immigration and Naturalization Service (INS) denied petitioner's application for adjustment of status and issued an order to show cause why he should not be removed. Pet. App. A2, C2-C3, E4.

3. a. On February 5, 1996, the INS commenced removal proceedings. Pet. App. C2, E4. Petitioner conceded removability but renewed his application for adjustment of status. *Id.* at C3, C8. A hearing was held before an immigration judge (IJ), at which evidence was introduced about petitioner's 1973 Yugoslavian conviction. *Id.* at A3.

The IJ determined that petitioner was ineligible for adjustment of status and ordered him removed. Pet. App. C1-C10. The IJ concluded that petitioner's 1973 Yugoslavian conviction had been for a crime involving moral turpitude, which rendered him inadmissible and thus required him to obtain a waiver under 8 U.S.C. 1182(h) in order to be eligible for adjustment of status. *Id.* at C8. The IJ noted that petitioner had not sought a waiver of inadmissibility under Section 1182(h), and she determined that petitioner would not have been eligible

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[1] In his habeas petition, petitioner admitted that he killed not only his wife but "her lover" as well. Pet. for Writ of Habeas Corpus ¶ 16; see *id.* Exh. F at 4 (petitioner stating that he was "convicted of killing my wife and her communist lover while in bed in my house, after her lover pulled a gun on me").

for such a waiver in any event because his 1973 offense constituted an "aggravated felony." *Id.* at C9.

b. On April 22, 2002, the Board of Immigration Appeals (BIA) affirmed the IJ's decision. Pet. App. D1-D4. The BIA agreed that petitioner's 1973 Yugoslavian conviction was for a crime involving moral turpitude. *Id.* at D2. The BIA observed that Section 1182(h)'s aggravated-felony bar applies only "in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence," 8 U.S.C. 1182(h), and it concluded that, because petitioner "is not a lawful permanent resident of this country, the aggravated felony bar does not apply." Pet. App. D3. The BIA determined, however, that petitioner was nonetheless ineligible for a Section 1182(h) waiver because it was "clear" that he "f[ell] within the scope of th[e] prohibition" (*ibid.*) on granting waivers to aliens "who ha[ve] been convicted of (or who ha[ve] admitted committing acts that constitute) murder." 8 U.S.C. 1182(h).

c. Petitioner filed a petition for review with the court of appeals. Pet. App. E4. Because petitioner's removal proceedings were commenced before April 1, 1997, and the final order of removal was entered after October 30, 1996, the petition for judicial review was governed by IIRIRA's "transitional" rules. See IIRIRA § 309(c)(1) and (4), 110 Stat. 3009-625, 626; see Pet. App. E5-E6. Those rules provided that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in [8 U.S.C. § 1182(a)(2)]." IIRIRA § 309(c)(4)(G), 110 Stat. 3009-626. One of the offenses listed in Section 1182(a)(2) is "a crime involving moral turpitude." 8 U.S.C. 1182(a)(2)(A)(i)(I).

On October 22, 2002, the court of appeals dismissed the petition for review. Pet. App. E1-E9. The court recited the "general principle" that "a federal court always has jurisdiction to examine its own jurisdiction," and it observed that "[a] number of circuits have agreed that in the immigration context the court of appeals can determine whether the crimes asserted to be the jurisdictional bar are within the meaning of the statute." *Id.* at E6-E7 (quoting *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002)). The court of appeals stated, however, that it could "find no basis" for rejecting the conclusions of the IJ and the BIA that the government had adequately established the existence of petitioner's 1973 Yugoslavian conviction and that the conviction was for a crime involving moral turpitude. *Id.* at E8.[2] Because it dismissed the petition for review on jurisdictional grounds, see *ibid.*, the court of appeals did not review the BIA's determination that petitioner was ineligible for a waiver of inadmissibility under 8 U.S.C. 1182(h). See Pet. App. A4.

4. a. Although he would have been eligible to do so, see *St. Cyr*, 533 U.S. at 305-314, petitioner did not file a petition for a writ of habeas corpus in an appropriate district court following the court of appeals' dismissal of his petition for review.

b. On May 11, 2005, the President signed into law the REAL ID Act of 2005 (REAL ID Act), Pub. L. No. 109-13, Div. B, 119 Stat. 302. The REAL ID Act eliminates habeas corpus jurisdiction to review orders of removal, and provides, subject to one exception not at issue here, that "the sole and exclusive means for judicial

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[2] Petitioner states that he "is not challenging the classification of his conviction as one that involves moral turpitude." Pet. 7 n.3.

review of an order of removal" is by way of a timely filed petition for review in the appropriate court of appeals. § 106(a)(1), 119 Stat. 310 (8 U.S.C. 1252(a)(5)); see § 106(a)(1)(A)(i) and (ii), 119 Stat. 310 (making similar amendments to 8 U.S.C. 1252(a)(2)(A), (B) and (C)). The REAL ID Act further provides that an alien whose criminal convictions previously operated to preclude judicial review of an order of removal by way of a petition for review may now obtain "review of constitutional claims or questions of law" via such a petition. § 106(a)(1)(A)(iii), 119 Stat. 310 (8 U.S.C. 1252(a)(2)(D)). The REAL ID Act specifically provides that its new procedures "shall apply to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of the enactment of this division." § 106(b), 119 Stat. 311 (8 U.S.C. 1252 note (Supp. V 2005)).

5. On August 17, 2006—nearly three years and ten months after the court of appeals dismissed his petition for judicial review and a year and three months after the REAL ID Act's enactment—petitioner filed a petition for a writ of habeas corpus in district court. Pet. App. A4. In that filing, petitioner asserted that the BIA had erred in concluding that he was ineligible for a waiver of inadmissibility under 8 U.S.C. 1182(h). *Ibid.* The district court dismissed the habeas petition for lack of subject matter jurisdiction. *Id.* at B1.

6. The court of appeals affirmed. Pet. App. A1-A6. The court explained that the REAL ID Act had "eliminated habeas petitions as a means for judicial review of a removal order." *Id.* at A5. The court agreed with other courts of appeals that the REAL ID Act's jurisdiction-stripping provisions do not constitute "an unconstitutional suspension of the writ because the new statu-

tory scheme provides an 'adequate substitute' by allowing judicial review of the final order of removal through the courts of appeals." *Ibid.* Although petitioner argued "that he ha[d] been denied the opportunity to challenge the BIA's erroneous deportation order," the court stated that petitioner's argument "ignores the fact that he chose to wait to pursue his claims." *Ibid.* Because petitioner "waited approximately three years after this court affirmed the BIA's decision and over a year after the enactment of the [REAL ID Act] before filing his habeas petition," the court of appeals held that "[h]e cannot be heard to argue that the [REAL ID Act] now improperly bars his claims." *Id.* at A5-A6. As a result, the court of appeals determined that "the merits of the BIA's decision"—that is, the BIA's conclusion that petitioner was not eligible for a discretionary waiver of inadmissibility under 8 U.S.C. 1182(h)—"are not subject to review." *Id.* at A6.

ARGUMENT

1. Petitioner contends (Pet. 15-24) that the court of appeals erred in concluding that the REAL ID Act deprived the district court of jurisdiction to consider his petition for a writ of habeas corpus. The court of appeals' decision is correct and does not conflict with the decisions of any other court of appeals. In addition, the specific question presented here has no prospective importance and concerns only a limited group of criminal aliens. Further review is therefore unwarranted.

a. As the courts of appeals have uniformly held, the REAL ID Act "unequivocally eliminates habeas corpus review of orders of removal," *Marquez-Almanzar* v. *INS*, 418 F.3d 210, 215 (2d Cir. 2005), replacing that avenue of review with a right to petition for review in a

court of appeals.[3] See 8 U.S.C. 1252(a)(5). The REAL ID Act thus "takes away no substantive right but simply changes the tribunal that is to hear the case." *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916).

Petitioner does not dispute the court of appeals' general conclusion that the REAL ID Act "eliminate[s] habeas petitions as a means for judicial review of a removal order." Pet. App. A5. Instead, he asserts that Congress "overlooked" (Pet. 19) the situation of aliens, such as himself, who were previously ineligible to file a petition for review but whose orders of removal became final more than 30 days before the REAL ID Act took effect. Because petitioner is now time-barred from filing a petition for judicial review, he argues that the REAL ID Act should be construed to permit his habeas petition to proceed.

Petitioner's arguments are meritless. The REAL ID Act specifically identifies one—and only one—discrete category of aliens who are to be excused from compliance with the newly applicable requirement that the only way to obtain judicial review of a final order of removal is via the filing of a timely petition for review in the appropriate court of appeals. In Section 106(c) of the REAL ID Act, Congress provided that all habeas petitions filed by aliens challenging a final order of removal that were pending in the district courts on the date of its enactment "shall [be] transfer[ed] * * * to the court of appeals for the circuit in which a petition for review could have been properly filed under [8 U.S.C.

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[3] See *Kolkevich* v. *Attorney Gen.*, 501 F.3d 323, 329 (3d Cir. 2007); *Jama* v. *Gonzales*, 431 F.3d 230, 232 (5th Cir. 2005); *Gittens* v. *Menifee*, 428 F.3d 382, 384 (2d Cir. 2005); *Ishak* v. *Gonzales*, 422 F.3d 22, 29 (1st Cir. 2005); *Alvarez-Barajas* v. *Gonzales*, 418 F.3d 1050, 1051 (9th Cir. 2005).

1252 or 8 U.S.C. 1101 note]," where they shall thereafter be treated as timely filed petitions for review. § 106(c) 119 Stat. 311 (8 U.S.C. 1252 note (Supp. V 2005)). Petitioner does not fall within that category, however, because he did not have a pending habeas petition on the date of the REAL ID Act's enactment. In fact, petitioner failed to file his habeas petition until a year and three months *after* the REAL ID Act took effect.

Petitioner also asserts (Pet. 19) that "[a] strict reading of" the REAL ID Act has the effect of "depriving [him] of habeas review without providing an adequate, let alone any, substitute." Several statements in the petition for a writ of certiorari could be taken to suggest that petitioner *could not have* filed a petition for a writ of habeas corpus before the REAL ID Act was enacted because he was not "in the physical custody of" the Department of Homeland Security (DHS) at that time. Pet. 1, see Pet. 19, 24. As petitioner elsewhere acknowledges (Pet. 7), however, he "could have challenged the BIA's decision through a petition for a writ of habeas corpus" as soon as the court of appeals dismissed his petition for judicial review for lack of jurisdiction in 2002. Accord *Mustata* v. *United States Dep't of Justice*, 179 F.3d 1017, 1021 n.4 (6th Cir. 1999) (stating that the issuance of a final order of removal is sufficient to render an alien "in custody" for purposes of 28 U.S.C. 2241, regardless of whether the alien is physically detained); see *Simmonds* v. *INS*, 326 F.3d 351, 354-355 (2d Cir. 2003) (same); *Aguilera* v. *Kirkpatrick*, 241 F.3d 1286, 1291 (10th Cir. 2001) (same). Because the court of appeals dismissed his petition for review on October 22, 2002, and because the REAL ID Act did not take effect until May 11, 2005, there was a period of more than two-and-a-half years during which petitioner could have—

but did not—seek to obtain judicial review of his current claims by way of a petition for a writ of habeas corpus. As the court of appeals correctly observed, petitioner "cannot be heard to argue that the [REAL ID Act] now improperly bars his claims, when he failed to diligently pursue them when the opportunity was available." Pet. App. A5-A6.

Nor does this case raise any valid concerns about notice (see Pet. 22). The REAL ID Act was enacted on May 11, 2005. Despite having been "put on notice that a significant change to our immigration laws had taken place," *Kolkevich* v. *Attorney Gen.*, 501 F.3d 323, 338 n.9 (3d Cir. 2007), petitioner made no attempt to preserve his ability to seek judicial review until more than a year later. "Given that [the REAL ID Act] clearly expressed Congress's intention to cut short the filing time afforded criminal aliens under § 2241, [he] should have been aware that something was afoot." *Ibid.*; accord *Singh* v. *Mukasey*, 533 F.3d 1103, 1109 (9th Cir. 2008) ("The signing into law of [the REAL ID Act] on May 11, 2005 * * * put Singh on sufficient notice that jurisdiction over his petition now rested with the court of appeals and that he would need to act promptly to obtain review.").

b. The court of appeals' decision in this case does not conflict with the decisions of any other court of appeals. With respect to aliens (such as petitioner) who could not file a petition for judicial review prior to the REAL ID Act's enactment, the Second, Third, and Ninth Circuits have determined that it was appropriate to fashion a 30-day "grace period" from the effective date of the REAL ID Act for the filing of a petition for judicial review in the appropriate court of appeals. See *Singh*, 533 F.3d at 1108-1109 (see Pet. 8-9, 23); *Ruiz-Martinez* v. *Mukasey*,

516 F.3d 102, 117 (2d Cir. 2008) (see Pet. 9, 23), *Kolkevich*, 501 F.3d at 336-337 (see Pet. 9, 23). Petitioner, however, did not attempt to file a post-REAL ID Act petition for judicial review in the court of appeals within 30 days of the REAL ID Act's enactment. Instead, he filed a petition for a writ of habeas corpus in federal district court and he did so "over a year" (Pet. App. A5) after the REAL ID Act took effect. Petitioner has failed to demonstrate that any court would conclude that it had jurisdiction over such an action. See *Dalombo Fontes* v. *Gonzales*, 483 F.3d 115, 119-120 (1st Cir.) (refusing to recognize a post-REAL ID Act "grace period" for the filing of a petition for a writ of habeas corpus and noting that there had been a seven-month period prior to the REAL ID Act's enactment during which the alien in that case could have sought habeas relief), amended on reh'g, 498 F.3d 1 (1st Cir. 2007), cert. denied, 128 S. Ct. 2473 (2008).[4]

c. Certiorari is also unwarranted because the threshold jurisdictional issue is not one of any prospective

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[4] Petitioner also quotes (Pet. 23) the First Circuit's statement in *Peguero-Cruz* v. *Gonzales*, 500 F.3d 358, 361 n.4 (2007), that there was a "colorable" argument in the case before it "that applying the REAL ID Act to deprive us of jurisdiction over [the petition for review in that case] would amount to a violation of the Suspension Clause," cert. denied, 128 S. Ct. 2473 (2008). But the panel did not reach any Suspension Clause issues because it concluded that any such argument had been waived. *Ibid.* In addition, *Peguero-Cruz* involved the sort of alien contemplated in *Singh*, *Ruiz-Martinez*, and *Kolkevich*—that is, one who filed a petition for judicial review within 30 days of the REAL ID Act's enactment. See *Peguero-Cruz*, 500 F.3d at 359-361. Nor does the First Circuit's ultimate holding in *Peguero-Cruz* aid petitioner, because the panel viewed its earlier decision in *Dalombo Fontes* as "mak[ing] clear" that courts should "not carve out an additional path to judicial review where Congress has not." *Id.* at 361.

importance, and, as petitioner acknowledges (Pet. 22), the class of affected aliens is "small." As the Third Circuit has observed:

> The dearth of case law on this topic is due, undoubtedly, to the fact that these issues are pertinent only to a very narrow class of aliens. First, only criminal aliens are affected, since it is only that type of alien that had access to habeas review prior to [the Real ID Act's] enactment. Second, the pool is further reduced to those criminal aliens who, at the time [the Real ID Act] became effective, had not yet filed their habeas petitions.

Kolkevich, 501 F.3d at 330.

2. Petitioner also seeks this Court's review (Pet. 9-15) of the BIA's 2002 conclusion that he is ineligible for a waiver of inadmissibility under 8 U.S.C. 1182(h). Further review is not warranted.

a. The court of appeals did not reach the question of whether petitioner was eligible for a Section 1182(h) waiver because it concluded that the REAL ID Act deprived it of jurisdiction to consider petitioner's petition for a writ of habeas corpus. Pet. App. A6. This Court "ordinarily do[es] not decide in the first instance issues not decided below." *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (per curiam) (citation omitted). In addition, this Court could not reach the merits of petitioner's challenge to the BIA's 2002 decision unless it were to grant review, and conclude that the court of appeals erred, with respect to the threshold jurisdictional issue. As explained previously, further review is not warranted with respect to that question.

b. In any event, petitioner's challenges to the BIA's 2002 decision are entirely factbound. Petitioner likewise

does not contend that the BIA's conclusion that he is ineligible for a waiver under Section 1182(h) conflicts with any decision of this Court or of a court of appeals.

c. Petitioner's challenges to the BIA's 2002 decision are also without merit. As a procedural matter, petitioner claims (Pet. 9, 11) that the BIA should not have considered whether his 1973 Yugoslavian conviction was one for "murder" within the meaning of 8 U.S.C. 1182(h) but rather should have remanded the matter to the IJ.

The BIA certainly would have had discretion to order such a remand, but it was under no obligation to do so. Whether petitioner is eligible for a Section 1182(h) waiver is ultimately a legal question, and the BIA did not err in concluding that no further "findings of fact" (Pet. 11) were needed in order to resolve the issue. See Pet. App. D3 (stating that "[i]t is clear that" petitioner is ineligible for a Section 1182(h) waiver).[5] It is common for reviewing tribunals to affirm a previous decision-maker's judgment on alternative, but closely related grounds, and, as the party seeking a discretionary immigration benefit, it was petitioner's burden to demonstrate that he was eligible for a waiver of inadmissbility under Section 1182(h). See 8 C.F.R. 1240.8(d); *Matovski* v. *Gonzales*, 492 F.3d 722, 738 (6th Cir. 2007). Because the 1973 Yugoslavian conviction that formed the basis for the IJ's decision that petitioner was ineligible for a waiver under Section 1182(h) unquestionably involved petitioner's role in causing the death of two other people, petitioner cannot reasonably claim surprise that the

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[5] At any rate, although 8 C.F.R. 1003.1(d)(3)(iv) (see Pet. 11) "restrict[s] the BIA's ability to add new evidence to the record," that regulation does not "prohibit the BIA from making a factual determination * * * upon *de novo* review of the record before it." *Belortaja* v. *Gonzales*, 484 F.3d 619, 624 (2d Cir. 2007).

BIA would consider whether that conviction constituted one for "murder" under that same section.

Petitioner's claim that the BIA erroneously concluded that his 1973 conviction was for "murder" within the meaning of Section 1182(h) (Pet. 11-14) also lacks merit. By describing his 1973 offens as "a crime of passion" (Pet. 13), petitioner appears to suggest that it was more akin to manslaughter than murder. But Yugoslavia had its own version of a manslaughter statute (Article 136), which applied to killings that occurred on the "spur of the moment" due to a "fit of rage." See Pet. for Writ of Habeas Corpus, Exh. H at 79. Petitioner, however, was convicted of violating a different statute (Article 135), which an English-language exhibit to his petition for a writ of habeas corpus describes as a "murder" statute. *Ibid.*

Petitioner suggests (Pet. 14-15) that the BIA erred in relying on a foreign conviction in determining that he was ineligible for a waiver under Section 1182(h). But it is well-established that foreign convictions may constitute grounds of removability where the conduct for that conviction is deemed criminal by United States standards. *In re McNaughton*, 16 I. & N. Dec. 569, 572 (B.I.A. 1978), aff'd, 612 F.2d 457 (9th Cir. 1980); accord *In re Eslamizar*, 23 I. & N. Dec. 684, 688 & n.6 (B.I.A. 2004); see *Pasquini* v. *INS*, 557 F.2d 536, 539 (6th Cir. 1999) (interpreting statute setting forth ground of deportability for drug convictions to include foreign convictions). And to the extent that petitioner argues that the government failed to produce sufficient evidence to support the *existence* of his 1973 conviction (see Pet. 13-14), the court of appeals specifically rejected that claim before dismissing his petition for judicial review in 2002. See Pet. App. E7-E8.

d. Finally, even if petitioner were *eligible* for a discretionary waiver of inadmissibility under Section 1182(h), it is extremely unlikely that he would be granted such a waiver in light of the extremely serious nature of his 1973 Yugoslavian conviction. The pertinent regulations provide that "[t]he Attorney General, in general, will not favorably exercise discretion" to grant a Section 1182(h) waiver "in cases involving violent or dangerous crimes, except in extraordinary circumstances." 8 C.F.R. 1212.7(d). Regardless of whether the offense that led to petitioner's 1973 conviction was more akin to "murder" or "manslaughter," it was, quite clearly, a "violent or dangerous crime[]." *Ibid.* In addition, petitioner has failed to demonstrate that his removal would cause the sort of "'exceptional and extremely unusual hardship'" or implicate the kind of "national security or foreign policy considerations" that the regulations indicate may sometimes justify granting a Section 1182(h) waiver in cases where an alien has committed such a crime. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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